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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

NO. 229

VANCE A. DOBBINS, JR. and JERRY CALVIN SMITH,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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PETITION TO REHEAR

Petitioners, Vance A. Dobbins, Jr. and Jerry Calvin Smith, petition for a rehearing on their petition for a writ of certiorari to the Court of Appeals for the Fifth Circuit which petition was denied upon October 13, 1969.

Petitioners respectfully submit that upon a close and appreciative reading of the record in this cause it is inescapable that the similarity to what this Honorable Court previously condemned in *Ballenbach v. U. S.*, 326 U.S. 607, concerning the intrusions of the trial judge resulting in a foreclosing of impartiality, is applicable here.

It is recognized no hard and fast ground rules for measuring the intrusions of a trial judge can be formulated and that each case must be scrutinized standing alone. *Brock v. North Carolina*, 344 U.S. 424; *Riley v. Goodman*, 315 F.2d 232.

Robertson v. State, 38 Tex. 187 and *Sunderland v. U. S.*, 19 F.2d 202 caution that the aggregate of the remarks by the trial judge may well reflect prejudice even though such remarks when viewed independently would fail to be prejudicial.

Here the trial judge took over the cross-examination of witnesses and became the prosecutor. *U. S. v. Hill*, 332 F.2d 105, *Jackson v. U. S.*, 329 F.2d 893.

It is noted that the Court of Appeals to which the petition for a writ of certiorari was sought has itself in the past criticized the very same practice complained of here. *Baker v. U. S.*, 357 F.2d 11, 14; *Hellman v. U. S.*, 339 F.2d 36. In *Herman v. U. S.*, 289 F.2d 362, 365-366, Judge Wisdom for the Fifth Circuit spoke affirmatively and in disapproval of a trial judge who asked many less questions than did the trial judge in the instant case.

Upon a whole reading of the record, it is respectfully submitted, there should be here applicable the same criticism enunciated by Chief Justice Hughes referred to in *Henry v. U. S.*, 204 F.2d 817, and in *Quercia v. U. S.*, 289 U.S. 466, 470.

The United States admits the existence of two distinct offenses under 18 U.S.C. 2314 and 18 U.S.C. 2315 and then cites *Corey v. United States*, 305 F.2d 232, 235-236 (C.A. 9), certiorari denied, 371 U.S. 956 (Memorandum, p. 3), for the distinction, and that a defendant may properly be convicted of both offenses if so charged in sepa-

rate counts of an indictment. Petitioners agree, however, this is not the instant case because Petitioners were indicted on but one count, 18 U.S.C. 2315.

The United States, citing *United States v. Pearce*, 275 F.2d 318, 325 (C.A. 7), then says "That petitioners *might* also have been convicted of the transportation of the stolen coins in interstate commerce, in violation of 18 U.S.C. 2314, *had they been indicted under that section*, does not preclude their conviction under Section 2315." (Emphasis added). This avoids the instant question.

In *Pearee* the defendants were indicted and convicted for (1) transporting stolen furs, and (2) receiving and concealing the same furs. Circuit Judge Major, for the Seventh Circuit, while reversing defendants' conviction on other grounds (unlawful search and seizure) said that a defendant; indicted for both transporting and receiving and concealing, may be convicted under both charges. While there is abundant authority to support this proposition the Petitioners were not charged with multiple offenses. The distinction is at once obvious. The question here is not whether they could be convicted of the offenses proscribed by 18 U.S.C. 2315 and 2314 but whether they can be convicted of the violation of 18 U.S.C. 2315 when the proof goes to 18 U.S.C. 2314.

It is most respectfully submitted that in order to implement this Honorable Court's power of supervision over the lower courts in their conduct of orderly proceedings, this Court should, upon this petition for rehearing, vacate the order denying the petition for a writ of certiorari and grant the writ so that this whole case could come under the judicial scrutiny of this Court for resolution upon the substance after a detailed presentation of the case has been made to this Court.

WHEREFORE, it is prayed that this petition to rehear under Rule 58 be granted.

Respectfully submitted,

H. H. GEARINGER,
101 Professional Building,
Chattanooga, Tennessee 37402,

Attorney for Petitioners.

October 27, 1969.

CERTIFICATION

I, H. H. Gearinger, Attorney for petitioners, certify that the foregoing Petition to Rehear is not filed for any purpose of delay but for what is believed to be good cause on the facts and law and in the belief this Honorable Court should review the record in order to pass fully upon the merits thereof.

H. H. GEARINGER